

Sarah R. Gonski (# 032567)  
PERKINS COIE LLP  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
Telephone: (602) 351-8000  
Facsimile: (602) 648-7000  
SGonski@perkinscoie.com

Marc E. Elias (WDC# 442007)\*  
Elisabeth C. Frost (WDC# 1007632)\*  
John M. Geise (WDC# 1032700)\*  
PERKINS COIE LLP  
700 Thirteenth Street NW, Suite 600  
Washington, D.C. 20005-3960  
Telephone: (202) 654-6200  
Facsimile: (202) 654-6211  
MElias@perkinscoie.com  
EFrost@perkinscoie.com  
JGeise@perkinscoie.com

Abha Khanna (WA# 42612)\*  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: (206) 359-8000  
Facsimile: (206) 359-9000  
AKhanna@perkinscoie.com

*\*Motions for Pro Hac Vice Forthcoming*

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Brian Mecinas; C.V., *ex rel.* Carolyn Vasko;  
DNC Services Corp., d/b/a Democratic  
National Committee; DSCC; and Priorities  
USA,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as the  
Arizona Secretary of State,

Defendant.

No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 Plaintiffs Brian Mecinas, C.V., *ex rel.* Carolyn Vasko, DNC Services Corp., d/b/a  
 2 Democratic National Committee (the “DNC”), DSCC, and Priorities USA, file this  
 3 Complaint for Declaratory and Injunctive Relief against Defendant Katie Hobbs, in her  
 4 official capacity as the Arizona Secretary of State, and allege as follows:<sup>1</sup>

### 5 NATURE OF THE CASE

6 1. It is now well established that the candidate whose name appears first on a  
 7 ballot in a contested race receives an electoral benefit *solely* due to her first position.  
 8 Politicians and parties long strongly suspected as much, but this particular piece of political  
 9 mythology has been confirmed by academics again and again, persuasively and, in recent  
 10 years, definitively. The ballot order effect is the result of a well-studied and proven  
 11 phenomenon known as “position bias.”<sup>2</sup>

12 2. Multiple federal and state courts that have had the opportunity to consider the  
 13 question have come to the same conclusion: ballot order matters, and when it is unfairly or  
 14 arbitrarily assigned, it can raise concerns of constitutional magnitude. *See, e.g., Mann v.*  
 15 *Powell*, 333 F. Supp. 1261, 1267 (N.D. Ill. 1969), *aff’d* 398 U.S. 955 (1970) (affirming  
 16 preliminary injunction requiring ballot order be determined by nondiscriminatory means);  
 17 *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (holding unconstitutional statute  
 18 requiring party of candidate receiving most votes in prior congressional election be listed  
 19 first); *Sangmeister v. Woodard*, 565 F.2d 460, 468 (7th Cir. 1977) (“This court will not  
 20 accept a procedure that invariably awards the first position on the ballot to . . . the  
 21 incumbent’s party.”) (citation omitted); *Graves v. McElderry*, 946 F. Supp. 1569, 1581-82  
 22 (W.D. Okla. 1996) (finding system always listing one party first unconstitutional); *Netsch*  
 23 *v. Lewis*, 344 F. Supp. 1280 (N.D. Ill. 1972) (holding statute prescribing ballot order by past  
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25 <sup>1</sup> This Complaint refers to Brian Mecinas and C.V., *ex rel.* Carolyn Vasko  
 26 collectively as the “Voter Plaintiffs” and the entity plaintiffs as the “Organizational  
 Plaintiffs.”

27 <sup>2</sup> Other terms for this phenomenon include the “primacy effect,” or, in elections  
 28 specifically, “ballot order effect” and “candidate name order effect.”

1 electoral success violated equal protection); *Gould v. Grubb*, 14 Cal. 3d 661, 664 (1975)  
2 (holding statute always placing incumbents first unconstitutional); *Holtzman v. Power*, 313  
3 N.Y.S.2d 904, 908-09 (N.Y. Sup. Ct. 1970) (holding system requiring incumbent at top of  
4 ballot unconstitutional), *aff'd*, 311 N.Y.S.2d 824 (1970).

5 3. The Arizona Supreme Court came to a similar conclusion in *Kautenberger v.*  
6 *Jackson*, 85 Ariz. 128, 131, 333 P.2d 293, 295 (1958), when it invalidated a law that  
7 concerned the ballot order of candidates in primary elections. Although Arizona rotated the  
8 order of candidates on paper ballots in primaries, the law in question established a different  
9 rule for machine ballots—on those types of ballots, candidates were to be listed in  
10 alphabetical order. In finding the law violated the State Constitution, the Arizona Supreme  
11 Court found that the randomization of candidate order was necessary due to the “well-  
12 known fact” that, “where there are a number of candidates for the same office, the names  
13 appearing at the head of the list have a distinct advantage,” and without name rotation,  
14 candidates whose names are never listed first are “disadvantage[d].” *Id.* at 131.

15 4. To this day, Arizona law still requires that, in primary elections, candidate’s  
16 names must be rotated on a precinct-by-precinct basis. *See* A.R.S. § 16-464 (2018) (names  
17 of candidates shall be rotated so that “the name of each candidate shall appear substantially  
18 an equal number of times at the top, at the bottom” of ballots across the jurisdiction).  
19 Arizona does not, however, apply the same rule to ensure fairness in the State’s general  
20 elections.

21 5. Instead, Arizona law mandates that *all* of the ballots in any given county *must*  
22 list first, in every partisan election, *only* those candidates who affiliate with a single party.  
23 Specifically, A.R.S. § 16-502(E) (2018) (the “Ballot Order Statute”), requires that all  
24 candidates who belong to the same political party as the gubernatorial candidate who won  
25 the most votes in that county during the last general election (the “favored party”) must be  
26 listed first *for every race* on that county’s general election ballots.<sup>3</sup>

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27  
28 <sup>3</sup> Candidates are listed “in descending order according to the votes cast for governor

1           6. Remarkably, even in the midst of this inequitable general election system,  
2 Arizona appears to recognize the value of name rotation by providing for equal rotation  
3 among candidates who belong to the same political party. A.R.S. § 16-502(H). Arizona law  
4 thus acknowledges and accounts for the effects of position bias whenever partisanship is  
5 not involved, seeking fairness in candidate ordering through rotation in primary elections  
6 and between candidates of the same political party.

7           7. Yet, the order of candidates from similarly situated but different political  
8 parties who are running against each other in the general election is *never* rotated on a single  
9 ballot within a county. Instead, the Ballot Order Statute mandates that every single ballot  
10 list the candidates from the favored party first. The disfavored party—even if similarly (or,  
11 for all meaningful purposes, identically) situated—has no opportunity for any of its  
12 candidates to be listed first on even a single ballot within the county. There are no  
13 exceptions.

14           8. Thus, because Republican Doug Ducey won the majority of Maricopa  
15 County’s votes for Governor during the 2018 election, the Ballot Order Statute requires that  
16 Republican candidates must be listed first (and before their Democratic opponents) in each  
17 and every race on every single ballot voted by every voter in the County through at least  
18 2022. Yet, because of A.R.S. § 16-502(H), if there is more than one Republican candidate  
19  
20

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21 for that county in the most recent election for the office of governor.” A.R.S. § 16-502(E).  
22 The remaining portions of A.R.S. § 16-502(E), which are not challenged here, mandate that,  
23 “[i]n the case of political parties that did not have candidates on the ballot in the last general  
24 election, such parties shall be listed in alphabetical order below the parties that did have  
25 candidates on the ballot in the last general election,” followed by independent candidates.  
26 The U.S. Supreme Court has recognized that differential treatment of major and minor party  
27 candidates is constitutionally appropriate. *See Timmons v. Twin Cities Area New Party*, 520  
28 U.S. 351, 367 (1997) (allowing states to “enact reasonable election regulations that may, in  
practice, favor the traditional two-party system”). It has not done the same for similarly  
situated major parties. In fact, courts have repeatedly stricken ballot order systems that  
prioritize one similarly situated major party over another. *See Graves*, 946 F. Supp. at 1580-  
81; *McLain*, 637 F.2d 1159, 1166.

1 running for a given office, *their* names *will* be rotated equitably on ballots within the County  
2 so that each gets first billing on ballots in roughly the same number of precincts.

3 9. Although theoretically the Ballot Order Statute's county-specific application  
4 could mean that the benefits of the first position are distributed equitably among the major  
5 party candidates, that is not, and has never been, the case. Arizona's population is not  
6 equitably divided among its counties—not even close. Nor have election results varied  
7 significantly enough from county to county in past gubernatorial races to result in even a  
8 rough equalization in distribution.

9 10. In 2020, the Ballot Order Statute will operate in Arizona to the almost  
10 exclusive benefit of Republican candidates. Applying the results of the 2018 gubernatorial  
11 election, the Statute will require that, on every general election ballot in *all but four* of  
12 Arizona's 15 counties, voters will be presented with ballots that list Republican candidates  
13 first in every single partisan race. Those counties are home to over 80% of Arizona's total  
14 population.

15 11. As a result, Republican candidates will have a significant, state-mandated  
16 advantage, up and down the slate of partisan races, which in 2020 will include a highly  
17 competitive race for U.S. Senate, all of Arizona's nine congressional districts, and the entire  
18 State Senate and House of Representatives. In the U.S. congressional races, voters in six of  
19 Arizona's nine districts will see only Republican candidates listed first; the same is true for  
20 voters in 21 of Arizona's 30 state legislative districts.

21 12. The heavy favoring of the Republican Party that the Ballot Order Statute will  
22 mandate in 2020 is far from an anomaly. To reach this conclusion, one need look no further  
23 than the case of Maricopa County, which alone is home to nearly two-thirds of Arizona's  
24 total population. With the exceptions of 1982 and 2006, a Republican candidate has  
25 received a majority of the vote in the governor's race in Maricopa County for the last several  
26 decades. The Ballot Order Statute has thus ensured that the majority of Arizona's populace  
27 has consistently received general election ballots with Republican candidates appearing first  
28 on all partisan races. In the nearly 40 years that the Statute has been in place, the median

1 elector year has seen 70 percent of the state's population receive a ballot with one party's  
2 candidates in the top position. For 31 of those years, the party to receive that benefit has  
3 been the Republican Party.

4 13. Plaintiffs in this case include two individual Arizona voters who have  
5 supported and plan to continue to support Democrats for public office in Arizona, in 2020  
6 and beyond; the DNC, the official national party committee for the Democratic Party, which  
7 supports the election of Democrats up and down the ticket across the country, including in  
8 Arizona; the DSCC, a political committee whose central mission is to support Democratic  
9 candidates to the U.S. Senate, including the Arizona Senate seat up for election in 2020;  
10 and Priorities USA, a voter-centric progressive advocacy and service organization whose  
11 mission is to build a permanent infrastructure to engage Americans in the progressive  
12 movement, including specifically in Arizona. Each of these Plaintiffs has been and will  
13 continue to be severely injured as a direct result of the Ballot Order Statute which, election  
14 after election, has overwhelmingly favored the Republican Party and, absent an order from  
15 this Court, is guaranteed to do so again in 2020.

16 14. At its most basic, the Ballot Order Statute injures Plaintiffs and the candidates  
17 they support, as well as the voters who affiliate with them, by treating them differently from  
18 the similarly-situated Republican Party and its candidates, solely because a Republican  
19 candidate won the most votes for Governor in their respective county—in an entirely  
20 unrelated election. The Ballot Order Statute also dilutes the vote of Arizonans including the  
21 Voter Plaintiffs, each of whom consistently supports Democratic candidates in Arizona  
22 elections and all of whose votes must compete with the overwhelming majority of  
23 Arizonans who vote in counties where the favored party is the Republican Party. The  
24 resulting disparate treatment and burden on Plaintiffs' right to vote are not justified by any  
25 legitimate, much less compelling, state interest.

26 15. Simply put, the Ballot Order Statute offends the First and Fourteenth  
27 Amendments to the U.S. Constitution because it confers an unfair political advantage on  
28 candidates solely because of their partisan affiliation and the fact that a different candidate,

1 also affiliated with their party, won the majority of votes in a specific county in an unrelated,  
2 previous election. The advantage of appearing first on a ballot is statistically significant and  
3 its persistent accrual to the statutorily-favored party undermines the integrity of Arizona's  
4 elections. The Court should accordingly declare the Statute invalid, enjoin its operation, and  
5 require Arizona to use a ballot order system that gives similarly situated major-party  
6 candidates an equal opportunity to be listed first on the ballot. *See Mann*, 333 F. Supp. 1261,  
7 *aff'd* 398 U.S. 955.

### 8 JURISDICTION AND VENUE

9 16. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the  
10 deprivation under color of state law of rights secured by the United States Constitution.

11 17. This Court has original jurisdiction over the subject matter of this action  
12 pursuant to 28 U.S.C. §§ 1331 and 1343, because the matters in controversy arise under the  
13 Constitution and laws of the United States.

14 18. This Court has personal jurisdiction over the Defendant, the Secretary of  
15 State, who is sued in her official capacity only.

16 19. Venue is proper in the Phoenix Division of the U.S. District Court in the  
17 District of Arizona pursuant to 28 U.S.C. § 1391(b)(2) because, *inter alia*, the Defendant  
18 Secretary of State resides in this judicial district, and a substantial part of the events that  
19 gave rise to Plaintiffs' claims occurred there.

20 20. This Court has the authority to enter a declaratory judgment pursuant to 28  
21 U.S.C. §§ 2201 and 2202.

### 22 PARTIES

23 21. Plaintiff Brian Mecinas is a resident of the State of Arizona. He has been a  
24 resident of Arizona and of Maricopa County for the past 12 years, and is a freshman at  
25 Arizona State University. Mr. Mecinas turned 18 years old on May 31, 2019 and has already  
26 registered to vote. Mr. Mecinas considers himself to be a member of the Democratic Party.  
27 He regularly supports Democratic candidates in Arizona elections and intends to vote for  
28 Democratic Party candidates in the upcoming November 2020 general election. If the Court



1 does not enjoin the Ballot Order Statute prior to then, Republican Party candidates will be  
2 listed in the first position on the ballot in all partisan races in which he will be voting, and  
3 they will continue to receive an artificial and unfair advantage purely as a result of their  
4 ballot position. As a result, Mr. Mecinas will suffer serious, irreparable injury because of  
5 the Ballot Order Statute, both due to the dilution of his vote and the burden on his efforts to  
6 help elect Democratic Party candidates. His vote for Democratic Party candidates will be  
7 diluted relative to that of voters who cast their ballots for Republican Party candidates,  
8 because its weight and impact will be decreased—and the weight and impact of votes cast  
9 for Republican candidates increased—by the votes accruing to Republican candidates  
10 solely due to their first position on the ballot. Mr. Mecinas has also been actively engaged  
11 in efforts to help elect Democratic Party candidates in Maricopa County, including by  
12 interning for a Democratic candidate’s congressional campaign—efforts which the Ballot  
13 Order Statute makes significantly more difficult. He plans to continue these activities in  
14 regard to the upcoming 2020 election. The Ballot Order Statute, if it is not enjoined, will  
15 burden Mr. Mecinas’s ability to engage in effective efforts to elect Democratic Party  
16 candidates by requiring substantially more time and resources to achieve his mission.

17 22. Plaintiff C.V., *ex rel.* Carolyn Vasko, is a resident of the State of Arizona. She  
18 has been a resident of Glendale for the past 17 years. C.V. will turn 18 years old on January  
19 11, 2020 and plans to register to vote in time to vote in the upcoming 2020 election. C.V.  
20 considers herself to be a member of the Democratic Party. She regularly supports  
21 Democratic candidates in Arizona elections and intends to vote for Democratic Party  
22 candidates in the upcoming November 2020 general election. If the Court does not enjoin  
23 the Ballot Order Statute prior to then, Republican Party candidates will be listed in the first  
24 position on the ballot in all partisan races in which she will be voting, and they will continue  
25 to receive an artificial and unfair advantage purely as a result of their ballot position. As a  
26 result, C.V. will suffer serious, irreparable injury because of the Ballot Order Statute, both  
27 due to the dilution of her vote and the burden on her efforts to help elect Democratic Party  
28 candidates. Her vote for Democratic Party candidates will be diluted relative to that of



1 voters who cast their ballots for Republican Party candidates, because its weight and impact  
2 will be decreased—and the weight and impact of votes cast for Republican candidates  
3 increased—by the votes accruing to Republican candidates solely due to their first position  
4 on the ballot. C.V. has also been actively engaged in efforts to help elect Democratic Party  
5 candidates in Maricopa County, including during her mother’s 2014 candidacy for the  
6 Arizona State Legislature—efforts which the Ballot Order Statute makes significantly more  
7 difficult. She plans to continue these activities in regard to the upcoming 2020 election. The  
8 Ballot Order Statute, if it is not enjoined, will burden C.V.’s ability to engage in effective  
9 efforts to elect Democratic Party candidates by requiring substantially more time and  
10 resources to achieve her mission.

11       23. Plaintiff DNC is the national committee of the Democratic Party as defined  
12 by 52 U.S.C. § 30101(14). Its mission is to elect local, state, and national candidates of the  
13 Democratic Party to public office throughout the United States, including in Arizona. The  
14 DNC works to accomplish that mission by, among other things, working closely with  
15 Democratic candidates and assisting state parties by making expenditures on candidates’  
16 behalves, providing Get Out the Vote (“GOTV”) assistance, and actively supporting the  
17 development of programs benefiting Democratic Party candidates. The DNC has previously  
18 engaged in, and plans to continue to engage in, expenditures on behalf of Democratic Party  
19 candidates, GOTV assistance, and the development of programs to elect Democratic Party  
20 candidates in Arizona. The DNC has members and constituents across the United States,  
21 including in Arizona, where the DNC’s members and constituents include Democratic Party  
22 candidates, elected officials, and voters. The Ballot Order Statute directly harms the DNC  
23 by frustrating its mission and efforts to elect Democratic Party candidates in Arizona by  
24 giving an unfair, arbitrary, and artificial electoral advantage to Republican Party candidates  
25 in counties that house an overwhelming percentage of Arizona’s population. The DNC has  
26 had to and will have to expend and divert funds that otherwise would have supported GOTV  
27 and other mission-critical efforts in order to combat the effects of the Ballot Order Statute  
28 to assist in getting Democratic candidates elected in Arizona, including specifically in

1 anticipation of the 2020 general election. The Ballot Order Statute further harms the DNC  
2 because it treats the DNC's candidate members in Arizona differently than similarly  
3 situated Republican Party candidates in partisan elections by mandating that all Republican  
4 candidates must be listed first on the ballot in the vast majority of Arizona's counties, for  
5 no other reason than a Republican garnered the most votes in the last gubernatorial election  
6 in that county. As a result, unless the Ballot Order Statute is enjoined, Republican  
7 candidates will enjoy a significant, state-mandated advantage in 2020 (and beyond). The  
8 DNC's voter members and its constituency of Democratic voters also have suffered and  
9 will continue to suffer serious, irreparable injury as a result of the Ballot Order Statute,  
10 because their votes for Democratic Party candidates have been and will continue to be  
11 diluted by operation of the Ballot Order Statute.

12         24. Plaintiff DSCC is the national senatorial committee of the Democratic Party  
13 as defined by 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic  
14 Party to the U.S. Senate, including in and from Arizona. The DSCC works to accomplish  
15 its mission by, among other things, making expenditures for and contributions to  
16 Democratic candidates for U.S. Senate and assisting state parties throughout the country,  
17 including in Arizona. In 2018, the DSCC made contributions and expenditures in the tens  
18 of millions of dollars to persuade and mobilize voters to support Democratic Senate  
19 candidates. In 2020, there will be a Senate election in Arizona, and the DSCC will work to  
20 elect the Democratic candidate. As a result, the DSCC again intends to make substantial  
21 contributions and expenditures to support the Democratic candidate for U.S. Senate in  
22 Arizona in 2020. The Ballot Order Statute directly harms the DSCC by frustrating its  
23 mission, giving an unfair, arbitrary, and artificial electoral advantage to Republican Party  
24 candidates, including in elections for U.S. Senate. Most immediately, the DSCC will have  
25 to expend and divert additional funds and resources on GOTV, voter persuasion efforts, and  
26 other activities in Arizona, at the expense of its efforts in other states, to combat the effects  
27 of the Ballot Order Statute in the 2020 general elections for U.S. Senate in Arizona.  
28

25. Plaintiff PRIORITIES USA (“Priorities”) is a 501(c)(4) nonprofit, voter-centric progressive advocacy and service organization. Priorities’ mission is to build a permanent infrastructure to engage Americans in the progressive movement by running a permanent digital campaign to persuade and mobilize citizens around issues and elections that affect their lives. To further this purpose, Priorities works to help elect Democratic Party candidates across the country, including in Arizona. In 2018, Priorities made contributions and expenditures in the tens of millions of dollars to persuade and mobilize voters to support Democratic candidates—some of which was spent for those purposes in Arizona. In 2020, Priorities again expects to make contributions and expenditures in the millions of dollars to persuade and mobilize voters to support Democratic candidates in state and federal elections around the country, including in Arizona elections. The Ballot Order Statute directly harms Priorities by frustrating its mission of, and efforts in, electing Democratic Party candidates in Arizona by giving an unfair and artificial electoral advantage to Republican Party candidates. Priorities is aware of the Ballot Order Statute and will have to expend and divert additional funds and resources in GOTV, voter persuasion efforts, and other activities in Arizona, at the expense of its efforts in other states, in order to combat the effects of the Ballot Order Statute in getting Democratic candidates elected in Arizona, including in regard to the 2020 general election.

26. Defendant Katie Hobbs is the Secretary of State of Arizona and is named as a Defendant in her official capacity. She is Arizona’s chief state election officer and, as such, is responsible for the administration and implementation of election laws in Arizona, including the Ballot Order Statute. *See* A.R.S. § 16-142. The Secretary, personally and through the conduct of her employees, officers, agents, and servants, acted under color of state law at all times relevant to this action.

### STATEMENT OF FACTS AND LAW

27. It is by now well-established that the candidate whose name is listed first on the ballot receives the advantage of additional votes solely due to her position on the ballot. *See Holtzman*, 313 N.Y.S.2d at 907 (recognizing “there is a distinct advantage to the

1 candidate whose name appears first on a ballot” and this phenomenon is “so widespread  
 2 and so universally accepted as to make it almost a matter of public knowledge”); Nuri Kim  
 3 et al., *Moderators of Candidate Name-Order Effects in Elections: An Experiment*, 36  
 4 Political Psychology 525, 526 (2015) (“The body of research on name-order effects  
 5 indicates that candidates often received more votes when their names were listed first than  
 6 when their names were listed after the names of one or more candidates with whom they  
 7 competed.”); Josh Pasek et al., *Prevalence and Moderators of the Candidate Name-Order*  
 8 *Effect*, 78 Public Opinion Quarterly 416, 417 (2014) (“Most studies reported evidence of  
 9 primacy effects, whereby candidates received more votes when listed first than when listed  
 10 later.”); *see also McLain*, 637 F.2d at 1166 (affirming “finding of ballot advantage in the  
 11 first position”); *Sangmeister*, 565 F.2d at 468 (“[T]he trial court’s conclusion that ‘top  
 12 placement on the ballot would be an advantage to the plaintiff’ is supported by substantial  
 13 evidence[.]”); *Graves v. McElderry*, 946 F. Supp. 1569, 1576 (W.D. Okla. 1996) (finding  
 14 “some measure of position bias exists in Oklahoma’s” elections); *Akins v. Sec’y of State*,  
 15 154 N.H. 67, 71 (N.H. 2006) (affirming finding that “the primacy effect confers an  
 16 advantage in elections”); *Gould*, 14 Cal. 3d at 664 (describing finding of position bias as  
 17 “consistent with parallel findings rendered in similar litigation throughout the country”);  
 18 *State ex rel. Roof v. Bd. of Comm’rs*, 39 Ohio St. 2d 130, 136 (Ohio 1974) (recognizing “it  
 19 is generally agreed” that “candidates whose names appear at the beginning of the list receive  
 20 some votes attributable solely to the positioning of their names”).

21       28. The Arizona Supreme Court has similarly long recognized that ballot ordering  
 22 schemes raise equal protection concerns because of position bias. In 1958—long before  
 23 contemporary social science research enabled statistical confirmation of what had been  
 24 suspected and largely accepted—the Court recognized that, “where there are a number of  
 25 candidates for the same office, the names appearing at the head of the list have a distinct  
 26 advantage.” *Kautenberger*, 85 Ariz. at 131. For that very reason, that Court held that the  
 27 State Constitution’s equal protection clause did not allow candidate’s names to be placed  
 28

1 “in alphabetical order according to the first letter of the surnames of the candidates,” during  
 2 certain primary elections. *Id.* at 129.<sup>4</sup>

3 29. The challenger in *Kautenberger* was a primary candidate whose last name  
 4 came near the middle of the alphabet, meaning that, if the law was upheld, “his name would  
 5 never appear first on the machine ballot.” *Id.* at 130. He argued that “places him at a  
 6 disadvantage with the voting public,” likely “decreas[ing] the number of votes which would  
 7 otherwise be cast for him, . . . amount[ing] to discrimination and creat[ing] privileges for  
 8 other candidates which he was denied.” *Id.* The Court agreed and invalidated the law. *See*  
 9 *generally id.*

10 30. Notwithstanding *Kautenberger*, Arizona’s present-day Ballot Order Statute  
 11 mandates that candidates appear in a specific order according to their partisan affiliation:

12 The lists of the candidates of the several parties shall be arranged with  
 13 the names of the parties in descending order according to the votes cast  
 14 for governor for that county in the most recent general election for the  
 15 office of governor, commencing with the left-hand column. In the case  
 16 of political parties that did not have candidates on the ballot in the last  
 17 general election, such parties shall be listed in alphabetical order below  
 18 the parties that did have candidates on the ballot in the last general  
 19 election. The names of all candidates nominated under § 16-341 shall  
 20 be placed in a single column below that of the recognized parties.

21 A.R.S. § 16-502(E).

22 31. Thus, the Ballot Order Statute, on its face, treats similarly situated political  
 23 parties differently, automatically granting the advantageous first position on every single  
 24 ballot for every single partisan race in each county to candidates who affiliate with the same  
 25 political party as the candidate who won the most votes in that county during the last  
 26 gubernatorial election.

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27 <sup>4</sup> Although the *Kautenberger* court referred to the relevant state constitutional  
 28 provision as the “privileges and immunities clause,” the clause has been long recognized as  
 the State’s correlative of the federal Equal Protection Clause and is also referred to  
 frequently as Arizona’s “equal protection clause.” *See, e.g., Kenyon v. Hammer*, 142 Ariz.  
 69, 77, 688 P.2d 961, 969 (1984) (en banc).

1           32. Candidates who affiliate with the favored party thus enjoy an artificial,  
2 arbitrary, and unfair electoral advantage based solely on the performance of a different  
3 candidate who affiliated with their party in an entirely different election that occurred years  
4 earlier.

5           33. This mandated and perpetual preference to the candidates who affiliate with  
6 the favored party in Arizona's general elections stands in stark contrast to the ballot order  
7 system that the State employs in other contexts.

8           34. In primary elections, Arizona rotates the names of candidates on a precinct-  
9 by-precinct basis. The result is that each candidate's name appears in the top position on a  
10 roughly equal number of ballots. *See* A.R.S. § 16-464 (2018).

11           35. Even in the general elections, a different provision of the Ballot Order Statute  
12 appears to implicitly recognize that position bias plays a role, because it mandates that  
13 candidates who belong to the same political party must be rotated so that each such  
14 candidate may be listed first among their partisan fellows on an equal basis. *See* A.R.S. §  
15 16-502(H).

16           36. As a direct result of the Ballot Order Statute, position bias has severely injured  
17 and, unless enjoined, will continue to injure Plaintiffs in Arizona elections.

18           37. This harm will be particularly felt in 2020, when Arizona is projected to have  
19 numerous highly competitive races.

20           38. As of the date of this filing, the Cook Political Report has three congressional  
21 races in Arizona on its list of competitive races (Congressional District 1, Congressional  
22 District 2, and Congressional District 6).

23           39. The *Washington Post* has identified Senator McSally's seat as competitive  
24 and among the ten Senate seats most likely to flip in 2020, ranking it the third most likely  
25 to change hands from Republican to Democratic.

26           40. At the state level, Republicans currently have only a two-seat majority in the  
27 Arizona State House, the closest divide since 1966, opening up the very real prospect that  
28 majority control of the Arizona State House will be up for grabs in the 2020 election.

1           41. Unless the Ballot Order Statute is enjoined, Republican candidates will enter  
2 the 2020 election with a state-mandated thumb on the scale in their favor, because over 80%  
3 of Arizona's voters will be presented with ballots in which the names of Republican  
4 candidates are listed first for every single partisan race. This is so for no other reason than  
5 that a *different* Republican candidate won the majority of that county's votes for a *different*  
6 office during a *different* election year.

7           42. The result will be severe and irreparable harm to the Plaintiffs, the candidates  
8 they support, and the voters who support them.

9           43. Neither political favoritism of one political party and its voters, nor purported  
10 election administration concerns, can sustain the Ballot Order Statute against legal  
11 challenge. *See Dunn v. Blumstein*, 405 U.S. 330, 351 (1972) ("States may not casually  
12 deprive a class of individuals of the vote because of some remote administrative benefit to  
13 the State."); *see also Graves*, 946 F. Supp. at 1580 (finding no legitimate state interest in  
14 always placing one major political party first on the ballot).

15           44. Nor can the state justify its arbitrary and unfair treatment of similarly situated  
16 major political parties, their candidates, and voters over the other by a claim of  
17 administrative necessity.

18           45. As discussed, Arizona already mandates name rotation during primary races  
19 and amongst partisan equals in general elections. Those systems were put in place precisely  
20 because of the concern that to do otherwise "would result [in] disadvantage to some  
21 candidates." *Kautenberger*, 85 Ariz. at 131. Implementing a similar rotational system in the  
22 general election would alleviate the burdens imposed by the Ballot Order Statute, as well  
23 as the arbitrary differential treatment that it presently mandates.

24           46. This has been the conclusion of several courts that have considered challenges  
25 to similarly flawed ballot order statutes. *See, e.g., McLain*, 637 F.2d at 1169 ("[T]he fairest  
26 remedy for a constitutionally defective placement of candidates would appear to be some  
27 form of ballot rotation whereby 'first position' votes are shared equitably by all candidates,"  
28 and "[o]ur preliminary research suggests that the most effective rotation system is one



1 which rotates names from one ballot to the next.”); *Gould*, 14 Cal. 3d at 676 (stating “a  
2 number of state courts have specifically ordered election officials to implement a ballot  
3 rotation method, thereby largely eliminating the potential distorting effect of positional  
4 preference”).

5 47. Even if applying Arizona’s already-existing rotational scheme for candidates  
6 of the same party to candidates of similarly situated parties would impose some minimal  
7 administrative burden, that burden cannot justify the disparate treatment that the current  
8 Ballot Order Statute mandates or outweigh the burden on the rights of political parties,  
9 candidates, and the voters who support them. *See, e.g., Mann*, 333 F. Supp. at 1261; *Meier*,  
10 637 F.2d at 1166; *Sangmeister*, 565 F.2d at 468; *Graves*, 946 F. Supp. at 1580; *Netsch*, 344  
11 F. Supp. at 1280; *Gould*, 14 Cal. 3d at 664; *Holtzman*, 313 N.Y.S.2d at 909.

## 12 **CLAIMS FOR RELIEF**

### 13 **COUNT I**

#### 14 **First and Fourteenth Amendments** 15 **U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202** 16 **Undue Burden on the Right to Vote**

17 48. Plaintiffs reallege and incorporate by reference all previous paragraphs, as  
18 though fully set forth herein.

19 49. A court considering a challenge to a state election law must carefully balance  
20 the character and magnitude of injury to the First and Fourteenth Amendment rights that  
21 the plaintiff seeks to vindicate against the justifications put forward by the State for the  
22 burdens imposed by the rule. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson*  
23 *v. Celebrezze*, 460 U.S. 780, 789 (1983).

24 50. This is a “flexible” sliding scale, where the rigorousness of scrutiny depends  
25 upon the extent to which the challenged law burdens voting rights. *Pub. Integrity All., Inc.*  
26 *v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016); *see also Akins*, 154 N.H. at 67  
27 (applying *Anderson-Burdick* and holding that strict scrutiny was correct test to determine  
28 constitutionality of ballot order system that prioritized candidate names alphabetically).

1           51. Courts need not accept a state’s justifications at face value, particularly where  
2 they are “speculative,” otherwise it “would convert *Anderson-Burdick*’s means-end fit  
3 framework into ordinary rational-basis review wherever the burden a challenged regulation  
4 imposes is less than severe.” *Soltysik v. Padilla*, 910 F.3d 438, 448–49 (9th Cir. 2018)  
5 (citing *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024-25 (9th Cir. 2016));  
6 *see also Crawford Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J.,  
7 controlling op.) (“However slight th[e] burden may appear, . . . it must be justified by  
8 relevant and legitimate state interests *sufficiently weighty to justify the limitation.*”) (quotation marks omitted) (emphasis added).

10           52. The Ballot Order Statute, which provides an unfair, arbitrary, and artificial  
11 advantage to all candidates whose political party received the most votes in each county in  
12 the last gubernatorial election, burdens the right to vote of those voters—including the Voter  
13 Plaintiffs and the members and constituencies of the Organizational Plaintiffs—who  
14 support candidates who affiliate with the non-favored party in each county, by diluting their  
15 vote relative to the votes for candidates who associate with the similarly situated, but  
16 statutorily-favored party. *See McLain*, 637 F.2d at 1163 (describing system of listing first  
17 candidates of party that received the most votes in last North Dakota congressional election  
18 as “burden[ing] the fundamental right to vote possessed by supporters of the last-listed  
19 candidates, in violation of the fourteenth amendment”); *see also Gould*, 14 Cal. 3d at 670  
20 (describing statute that prioritized ballot order by incumbency as “inevitably dilut[ing] the  
21 weight of the vote of all those electors who cast their ballots for a candidate who is not  
22 included within the favored class”).

23           53. The weight and impact of the Voter Plaintiffs’ votes (as well as the  
24 Organizational Plaintiffs’ membership and constituencies) are consistently decreased—and  
25 the weight and impact of the votes for the candidates who associate with the favored party,  
26 increased—by the votes accruing to the first-listed candidates solely due to their first  
27 position on the ballot as a result of the Ballot Order Statute.

54. The Ballot Order Statute is not justified by any legitimate state interest, let alone a compelling state interest, that is sufficiently weighty to justify the burden on the right to vote. *See McLain*, 637 F.2d at 1167 (holding state’s asserted interest in “making the ballot as convenient and intelligible as possible for the great majority of voters” was not a legitimate state interest to justify listing first on the ballot candidates of the political party that received the most votes in the last congressional election and constituted “favoritism”); *Gould*, 14 Cal. 3d at 675 (rejecting argument that state interests in promoting “efficient, unconfused voting” justified an incumbent-first ballot order system and holding that interest “in promoting speed in the voting booth” was not a “compelling” state interest); *Holtzman*, 62 Misc. 2d at 1024 (holding no rational basis for “favoritism to a candidate merely on the basis of his having been successful at a prior election” in terms of ballot order).

55. Thus, the burdens imposed by the Ballot Order Statute on the fundamental right to vote outweigh any alleged benefits of the law.

56. Injunctive and declaratory relief are needed to resolve this existing dispute, which presents an actual controversy between the Secretary of State and Plaintiffs, who have adverse legal interests, because the Ballot Order Statute subjects Plaintiffs to serious, concrete, and irreparable injuries to their fundamental right to vote, including, most immediately, in the upcoming general elections in 2020.

## **COUNT II**

### **Fourteenth Amendment**

#### **U.S. Const. Amend. XIV, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202**

#### **Disparate Treatment in Violation of the Right to Equal Protection**

57. Plaintiffs reallege and incorporate by reference all the above paragraphs, as though fully set forth herein.

58. The Equal Protection Clause of the Fourteenth Amendment prohibits states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

59. This constitutional provision requires “that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985);

1 *see also Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (holding Equal Protection Clause applies  
 2 to “the manner of [the] exercise [of voting]” and “once granted the right to vote on equal  
 3 terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote  
 4 over that of another”).

5 60. The Ballot Order Statute treats otherwise similarly situated major-party  
 6 candidates differently. In doing so, it grants a consistent, unfair, and arbitrary electoral  
 7 advantage to one party based solely on the county-level performance of that party’s  
 8 candidate in the last gubernatorial election. This preferential treatment consistently and  
 9 meaningfully disadvantages Plaintiffs and the candidates, members, constituencies, voters,  
 10 and organizations who support them, in violation of the Equal Protection Clause of the  
 11 Fourteenth Amendment. *See McLain*, 637 F.2d at 1166 (holding statute requiring political  
 12 party of the candidate who received the most votes in prior North Dakota congressional  
 13 election to be listed first on ballots unconstitutional, in violation of the Fourteenth  
 14 Amendment’s Equal Protection Clause); *see also Mann*, 333 F. Supp. at 1267 (enjoining  
 15 ballot order system of placing candidates at top of ballot based on prior electoral success—  
 16 due to “seniority” or “incumbency”—and stating that “[t]he Fourteenth Amendment  
 17 requires all candidates, newcomers and incumbents alike, to be treated equally”), *aff’d by*  
 18 398 U.S. 955 (1970); *Netsch*, 344 F. Supp. at 1281 (holding statute prescribing ballot order  
 19 by past electoral success violated Fourteenth Amendment because it denied “the right to  
 20 equal protection”); *Holtzman*, 62 Misc. 2d at 1024 (holding system requiring placement of  
 21 incumbent at top of ballot unconstitutional because it violated Equal Protection Clause); *see*  
 22 *also Sangmeister*, 565 F.2d at 468 (“This court will not accept a procedure that invariably  
 23 awards the first position on the ballot to . . . the incumbent’s party.”) (citation omitted).

24 61. The Ballot Order Statute does not further any legitimate state interest, much  
 25 less a compelling state interest, that is sufficiently weighty to justify its favoritism and the  
 26 serious and irreparable injury that results to the Plaintiffs because of that favoritism. *See,*  
 27 *e.g., McLain*, 637 F.2d at 1167 (holding state’s asserted interest in “making the ballot as  
 28 convenient and intelligible as possible for the great majority of voters” did not justify a

1 ballot order statute listing first on the ballot the candidates of the political party that won  
2 the last congressional race); *Holtzman*, 62 Misc. 2d at 1024 (holding no rational basis for  
3 “such favoritism to a candidate merely on the basis of his having been successful at a prior  
4 election” in terms of ballot order).

5 62. Injunctive and declaratory relief is needed to resolve this existing dispute,  
6 which presents an actual controversy between the Secretary of State and Plaintiffs, who  
7 have adverse legal interests, because the Ballot Order Statute subjects Plaintiffs to serious,  
8 concrete, and irreparable injuries due to disparate treatment in violation of the Equal  
9 Protection Clause, including, most immediately, in the upcoming 2020 general election.

10 **WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment:

- 11 (a) declaring, under the authority granted to this Court by 28 U.S.C. § 2201, that  
12 the Ballot Order Statute violates the First and Fourteenth Amendments to the  
13 U.S. Constitution;
- 14 (b) preliminarily and permanently enjoining the Secretary of State, her respective  
15 agents, officers, employees, and successors, and all persons acting in concert  
16 with each or any of them, from implementing, enforcing, or giving any effect  
17 to the Ballot Order Statute under the authority granted to this Court by Federal  
18 Rule of Civil Procedure 65(a) and 28 U.S.C. § 2202;
- 19 (c) awarding Plaintiffs their costs, disbursements, and reasonable attorneys’ fees  
20 incurred in bringing this action pursuant to 42 U.S.C. § 1988 and other  
21 applicable laws; and
- 22 (d) granting such other and further relief as the Court deems just and proper,  
23 including requiring the Secretary of State to use a ballot order system that  
24 gives similarly situated major-party candidates an equal opportunity to be  
25 listed first on the ballot.
- 26  
27  
28

1 Dated: November 1, 2019

/s Sarah R. Gonski

Sarah R. Gonski (# 032567)  
PERKINS COIE LLP  
2901 North Central Avenue, Suite 2000  
Phoenix, Arizona 85012-2788  
Telephone: (602) 351-8000  
Facsimile: (602) 648-7000  
SGonski@perkinscoie.com

Marc E. Elias (WDC# 442007)\*  
Elisabeth C. Frost (WDC# 1007632)\*  
John M. Geise (WDC# 1032700)\*  
PERKINS COIE LLP  
700 Thirteenth Street NW, Suite 600  
Washington, D.C. 20005-3960  
Telephone: (202) 654-6200  
Facsimile: (202) 654-6211  
MElias@perkinscoie.com  
EFrost@perkinscoie.com  
JGeise@perkinscoie.com

Abha Khanna (WA# 42612)\*  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: (206) 359-8000  
Facsimile: (206) 359-9000  
AKhanna@perkinscoie.com

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2019, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

/s Daniel R. Graziano